No. 14,809

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE HOLLMAN,
Appellant,

vs.

CATHERINE BRADY,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

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JURISDICTION.

The United States Court of Appeals for the Ninth Circuit has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92 of the Judiciary and Judicial Procedure Act, 28 U.S.C.A., June 25, 1948, c. 646, 62 Stat. 912; also, Section 8C of the Act of February 13, 1925, as amended (28 U.S.C.A. 1294). Practice in the District Court for the District of Alaska and appeals from the judgments rendered in said Court are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U.S.C.A. 103A.

STATEMENT OF FACTS.

The plaintiff, Catherine Brady, is the wife of Charles Brady, who together with the defendant and another person, Sam Mealey, as partners operated a taxicab company in Anchorage, Alaska. This partnership had been in existence for several years and the plaintiff, Catherine Brady, following her marriage in November, 1949 to Charles Brady, had become an employee of the cab company in the capacity of dispatcher.

Some time before the 14th of November, 1951, Charles Brady and Sam Mealey had proposed to Myrtle Hollman, the defendant, that the three partners form a corporation and operate the cab company as a corporation. The defendant had been reluctant (R. 17) to operate under a corporate organization (R. 18) for fear that Brady and Mealey would control the same and "take over the company" (R. 18). On or about the 14th of November, 1951, a meeting was held between the three partners at Mrs. Hollman's home to discuss the matter.

The defendant had been informed by a woman known as Marie Cox that the plaintiff had formerly lived in Butte, Montana, where at one time she had been a prostitute, and during the discussion with Brady regarding the forming of a corporation, and for the reason that plaintiff was now an employee of the cab company, defendant thought it her duty to tell Brady what she had heard.

On the other hand Brady testified that during the discussion regarding incorporation the defendant be-

came angry and told him that Mrs. Brady was an ex-whore from Butte, Montana (R. 19).

Brady, prior to his marriage to plaintiff, had been married and divorced from defendant's daughter. He had been a heavy drinker and had continued his use of intoxicating liquor after his marriage (R. 39).

Brady admitted also that he and the plaintiff for a period of six weeks, prior to their marriage, had lived together in an apartment in Anchorage (R. 42). The marriage of plaintiff and Brady was the third marriage for the plaintiff (R. 82) and plaintiff admitted that she had been a card dealer and had worked in gambling houses in Reno, Nevada, and had also worked as a card dealer both prior to her marriage to Brady and after in gambling houses in Anchorage and Kenai, Alaska (R. 82, 83).

Following the occurrence of the alleged slanderous statement, Brady returned to his apartment and told plaintiff what the defendant had said and asked plaintiff if it was true (R. 20). Plaintiff answered by stating that she had never been in Butte, Montana, and had never been a prostitute (R. 20, 61). Brady then left the apartment and did not return until the following morning, at which time he had been drinking heavily (R. 21) and according to plaintiff's testimony Brady cursed her and accused her of being a whore (R. 62). The plaintiff continued to work thereafter as a dispatcher for the Red Cab Company and the only time thereafter that the matter of the alleged slanderous statement came up was when Brady was drinking (R. 41, 63, 81) and at such times he would curse and abuse the plaintiff.

An examination of the testimony of both the plaintiff and her husband, Charles Brady, will show that such distress and suffering occasioned by the alleged slanderous statement resulted from Brady's conduct and then only when Brady was drunk. On several occasions Brady's conduct, while under the influence of liquor, became so violent as to cause Mrs. Brady to become ill, according to her testimony, and that she suffered a mild heart attack, and on one occasion left Brady and went to the States and did not return for three months, and that she only returned then because Brady called her long distance and asked her to return. She further testified that she came back to Alaska by plane and arrived in Anchorage early in the morning and that Brady was not at the airport to meet her, so she went on to the apartment, where some time later Brady came in drunk and mistreated her again. Mrs. Brady also testified that she did not approve of Brady's heavy drinking and often berated him about it (R. 79, 80), after which Brady would say he was sorry but would not promise to stop drinking (R. 80).

Neither Brady nor Mrs. Brady, the plaintiff, testified to any financial loss suffered by the plaintiff as a result of the alleged slanderous statement and Brady himself, the husband of plaintiff, admitted on cross-examination that he had faith in his wife, but when he got drunk he had doubts about her (R. 41).

The plaintiff thereafter filed her complaint and prayed for relief in the sum of $50,000.00 but pleaded no special damages (R. 3).

THE TRIAL.

The case proceeded to trial on the 31st day of January, 1955, before a jury. At the close of the evidence the defendant proposed certain instructions which were denied.

The Court then gave, among other instructions, number 3 and number 6, to which the defendant excepted. Following the giving of these instructions the case went to the jury which, after deliberation, returned a verdict awarding $1,500.00 to the plaintiff. The defendant appeals from the judgment based on that verdict.

QUESTIONS PRESENTED.

1. Whether the statement "Your wife is an ex-whore from Butte, Montana," is slander *per se* under the law as applicable in the Territory of Alaska.

2. Whether Instruction No. 6 correctly instructed the jury on the law of damages with respect to injuries arising from a slanderous utterance not constituting slander *per se.*

3. Whether Instruction No. 6 correctly instructed the jury as to the measure of damages when the *only* injuries suffered by the plaintiff were occasioned by plaintiff's husband while he was in an intoxicated condition.

ARGUMENT.

POINTS ONE AND THREE.

For purposes of argument appellant will join points one and three, which cover the instructions on slander given by the Court and the instructions on that subject proposed by appellant.

The Court in giving Instruction No. 3 did not correctly state the law of slander prevailing in the Territory of Alaska.

The general rule in connection with the utterance of words imputing unchastity to a woman is found in American Jurisprudence, Volume 33, Section 36 at page 59 and is as follows:

> "As respects oral charges of unchastity, the common law is that no mere words of mouth, no matter how gross, imputing a want of chastity to a woman, whether married or unmarried, will support an action for slander, without allegation and proof that such defamation has actually produced some special damage to the object of the slander. * * * Despite its harshness this common-law rule has been recognized in the United States, and it has been held in numerous instances that words imputing want of chastity or charging fornication are not actionable per se. * * *"

The same rule is similarly stated in Corpus Juris Secundum, Volume 55, page 70, as follows:

> "* * * As a general rule at common law oral words imputing a want of chastity, whether the person spoken of is a man or woman, and whether such person is married or single, are not actionable unless the words making such imputation

> cause specific damages. * * * In many states, by force of statutory provision oral language charging unchastity is made actionable per se. Some of these statutory provisions, however, operate only in favor of women, and do not apply in favor of a man against whom such words have been spoken, *and in such a case a man's right to recover for words falsely imputing want of chastity to him depends on the common law.*" (Emphasis ours.)

A more comprehensive statement of the law of slander *per se* is to be found in Newell on slander and libel. Commencing at page 71, Newell begins his treatment of the subject by stating the general rule as follows:

> "Defamatory words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished, are actionable in themselves."

and thereafter exhaustively discusses the subject and establishes that under the common law slanderous words amounting to slander *per se* must impute a crime for which the person, against whom the slanderous words are uttered, could be indicted and punished. The conclusions reached by Newell are similar to those which the Court held in the case of *Pollard v. Lyon,* 91 U.S. 225. That case holds that defamatory words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the

party, if the charge is true, may be indicted and punished, are actionable in themselves; and the same case further holds that if the slanderous utterance does not constitute slander *per se* then special damages must be claimed in the pleadings and proved on trial. This case represents a learned treatise on the whole subject of slander *per se* and slander *in quod* and establishes the rule which is now pronounced in the encyclopedias.

Section 30 of Newell discusses the American rule and lays down a test as follows:

> "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment then the words will be in themselves actionable."

and goes on to state:

> "And this test has been accepted and applied so often and so generally that it may now be accepted as settled law."

The Court has, of course, in Instruction No. 3 rejected the common-law rule and has adopted in lieu thereof a rule or a definition of slander *per se* which is similar or identical to the rule in states where statute has changed or modified the common-law rule. Whether the Court had a right to give the instruction would, it seems, depend upon whether the common-law rule had been abolished insofar as Alaska is concerned by the establishment of a statutory rule on the subject. There is no provision of law in the Territory of Alaska on the subject of slander *per se* changing

in any way the common-law rule. Newell treats the specific subject of utterance imputing unchastity to a woman in a special chapter on the subject and at Section 123 of that chapter at page 140 we find the following language:

> "In Idaho where the common-law rule exists it has been held not per se actionable to call a woman a public prostitute, and the same is true in Delaware, and also in Oregon."

The Oregon case, *Neelands v. Dugan,* 196 Pac. 1116, restates the common-law rule. This same section, Newell 123, further states at page 141:

> "Many states by statute specifically make an imputation of unchastity in slanderous form actionable per se."

It is quite clear that the present Court did not follow the common-law rule. By what authority the Court has modified the common-law doctrine at least for the purpose of his instruction in the *Brady* case we do not know.

We find that this American rule or common-law rule has not been modified or changed in any way in the Territory of Alaska by statute and therefore it would appear that in connection with a slanderous statement imputing unchastity to a woman the common law must be followed and therefore the Court's instruction and definition making a bare statement imputing unchastity to a woman slanderous *per se* without the further qualification that the slanderous words must contain the imputation of a crime, for which the person, against whom the slanderous state-

ment is made, could be charged and punished is erroneous and ought not to have been given. In giving this instruction the Court departed from precedent and without the aid of statutory modification has attempted to change the common-law rule on the subject of slander *per se* and has further departed from the rule heretofore applied in Alaska. With the *Brady* instruction as a guide to the jury, containing two separate definitions of slander *per se,* both of which are incorrect, it had the effect of placing before the jury an instruction on the law which misled them materially and particularly with reference to damages.

POINT TWO.

Instruction No. 6 is not a correct statement of the law of damages and this particular instruction did not serve as a trustworthy guide to the jury in setting a standard by which the jury could assess damages and also failed in giving sufficient guidance as to the measure of damages. With reference to damages, the plaintiff testified that all of her damage, i.e., illness, nervous condition, heart attacks, etc., came as a result of the abuse of her husband, Charles Brady, and that every time Brady got drunk he would abuse her in connection with the statement made by the defendant (R. 41, 49, 54, 55, 63, 67, 71, 81), and Brady himself admitted that he did not believe the statement except when he got drunk. It would appear, therefore, that any damages sustained by the plaintiff was not the direct or proximate result of the statement made by

the defendant, but was the result of the intervention of a third party. The law defining and establishing the various tests for the ascertainment of damages is restated in Section 18, Volume 15, American Jurisprudence at page 408, where the rule sets out as follows:

> "It is fundamental that in order to maintain an action for damages for injuries claimed to have been caused by a negligent or other tortious or wrongful act or omission it be made to appear that such act or omission was the proximate cause of the injuries complained of. In other words, in the ascertainment of liability, the law always refers an injury to the proximate, as distinguished from the remote, cause of such injury. The proximate cause of an injury is most frequently defined as that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred, * * *"

We also refer to Newell who, in a special section of his work on slander and libel, states the law with respect to damages and supports the statement previously quoted from American Jurisprudence that damages must be the direct or proximate result of the alleged slanderous words and must not result from any intervening cause unless the intervening cause was a direct result of the slanderous words, and in Section 796 at page 904, Newell states the rule as follows:

> "Acts of Third Persons. The act of a third party, if directly caused by the defendant's language, is not too remote, provided the defendant

> either did contemplate or ought to have contemplated such a result. The defendant cannot be held liable for any eccentric or foolish conduct on the part of the person he addressed; but only for the ordinary and reasonable consequences of his words. * * *"

If Brady, as he testified, did not believe the statement of Mrs. Hollman to be true except when he became intoxicated and then, and only then, did he abuse his wife and cause her injury, then her injuries surely derived from an intervention of a third party who behaved in an eccentric manner and under the influence of alcoholic liquor, voluntarily consumed, and could not result directly from the statement made by the defendant. In Instruction No. 6 the jury had no proper guide to the assessment of damages but were left to deliberate and decide without a proper and clear statement of the law on the subject, and in fact were instructed that if the plaintiff suffered mentally and was mortified and humiliated or suffered any damage to her marriage relationship, then to award her such amount as the jury though would fairly compensate her and failed to inform the jury that they must find the damages, if any, were the direct result of the defendant's statement without intervening cause or resulting from foolish and eccentric conduct on the part of plaintiff's husband, a third party to the action. If the jury had been properly instructed on this subject they would have then had the opportunity of deciding whether the plaintiff's injuries resulted from the statement made by the defendant or from the eccentric and foolish conduct

of plaintiff's husband, a third party, and if, having this opportunity, the jury had followed the evidence they must clearly have found that all of the plaintiff's injuries resulted from the eccentric and foolish conduct of plaintiff's husband and not from the utterance of the defendant.

POINT SEVEN.

Section 55-7-31 ACLA 1949, entitled "Compliance with Statute", provides as follows:

> "No case, either civil or criminal, shall be tried in any of the Courts of the Territory of Alaska, except in accordance with the provisions of this Act, and any violation of the provisions of this Act is hereby declared to be reversible error. * * *"

Section 55-7-41 ACLA 1949, entitled "Manner of Choosing Jurors", provides as follows:

> "Jurors for the trial of causes both civil and criminal in the District Court shall be chosen in the following manner, to-wit:
>
> When a case which is to be tried by a jury is called for trial, the clerk shall draw from the trial jury box containing the names of those on the regular panel who have been summoned and not excused as jurors, the names of twelve (12) persons; provided that if the panel consists of twenty-four (24) or more jurors available for immediate jury duty, and if the name of a juror is called who is engaged in trying of or deliberating on any other case, such name shall be rejected

and another name drawn in his stead, without delaying the completion of the panel. * * *"

The Territorial Legislature established with great care the method of drawing a jury panel from which subsequently a jury for the trial of the case could be selected and the method established for drawing such a panel was strictly by the law of chance so that no human agent could in any way select an individual for service on that panel. The Legislature further provided that when a jury was to be selected from the panel that the names of all persons on the panel not previously *excused as jurors* should be placed in the trial jury box and that thereafter twelve names were to be drawn from that box, and again the procedure of selecting the first twelve and subsequent names was left to the law of chance.

Immediately prior to the commencement of the *Brady v. Hollman* trial, the district judge departed from the regular procedure and ordered that every even-numbered person on the panel go to another courtroom and that every odd-numbered person on the panel remain for possible selection as jurors in the *Brady* case, leaving available for the *Brady* case only one half of those persons regularly drawn to serve as jurors on the petit jury panel (Sup. R. 99-101). The section above quoted provides that if the name of a juror is drawn who is engaged in the *trying* of or the *deliberating* on any other case that name could be rejected. It appears therefore that the Court has the right to excuse a person from jury service and

from the panel *as a juror* but would not have the right to excuse him otherwise. The Court could also reject the name of an individual drawn from the box if he was then and there serving as a juror in some other case. When the district judge sent every other juror on the panel to another place he deprived the defendant of her right to select a jury from the whole panel and he further, by his action, chose the individuals from whom the defendant could draw a jury. At the time he divided the jury by selecting every other name and excused them from the *Brady* case, they were not then and there serving as jurors in any other case and they were not excused as jurors. It would appear therefore that reversible error was committed when the Court required the case to go to trial over the objection of counsel for the defendant (Sup. R. 99-101), and when it was clearly evident that the method of selecting a jury for the trial of a civil case, as provided in Section 55-7-41 ACLA 1949, could not be followed.

CONCLUSION.

We conclude by stating that the Court's instructions to the jury, numbered 3 and 6, were erroneous and failed to give the jury a correct statement of the law as to slander and a correct statement of the law as to general and special damages, the difference between the two, and which was applicable to the subject case.

The Court also failed to impanel a jury in accordance with Alaska law to the prejudice of the de-

fendant; and for the foregoing reasons the judgment of the trial court should be reversed.

Dated, Anchorage, Alaska,
February 9, 1956.

Respectfully submitted,
HAROLD J. BUTCHER,
Attorney for Appellant.